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No. 02-1088

In the Supreme Court of the United States

RICHARD LEIDER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner suffered a taking of property requiring the payment of just compensation when the bankruptcy court paid petitioner his distributive share of a debtor's assets without interest after the unclaimed funds had been held in the United States Treasury for approximately two years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 301 F.3d 1290. The opinion of the district court (Pet. App. 15a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2002. A petition for rehearing was denied on October 23, 2002 (Pet. App. 23a). The petition for a writ of certiorari was filed on January 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an unsecured creditor of two individuals who filed for bankruptcy under Chapter 11

of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*, see 11 U.S.C. 301, in the Northern District of California. When the bankruptcy proceedings concluded in March 1996, petitioner was sent a check in the amount of $2162.67, his distributive share of the bankruptcy estate. Due to his change of address, however, petitioner did not receive that check. Pet. App. 3a.

Pursuant to 11 U.S.C. 347(a),[1] the unclaimed check was canceled after 90 days, and the proceeds were paid into the bankruptcy court. Following applicable procedures, the court then deposited the funds into the United States Treasury, which held the funds "in the name and to the credit of [the] court," 28 U.S.C. 2041, and which neither earned interest on the funds by investing them nor paid interest on the funds to the court or the ultimate claimants. Approximately two years later, petitioner petitioned the bankruptcy court for his distributive share of the estate and subsequently received the sum of $2162.67, without interest. Pet. App. 3a-4a, 16a; cf. 28 U.S.C. 2042.

2. Petitioner subsequently filed this class action. His complaint alleged, *inter alia*, "that the government's failure to pay interest on his distributive share of the unclaimed bankruptcy funds constituted a taking of property under the Fifth Amendment." Pet. App. 4a. The district court granted the government's motion to dismiss the complaint. *Id.* at 15a-22a. The court stated

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[1] 11 U.S.C. 347(a) provides:

> Ninety days after the final distribution under section 726, 1226, or 1326 of this title in a case under chapter 7, 12, or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of title 28.

that petitioner's "failure to file a change of address with the bankruptcy court resulted in the Treasury's temporary possession of [petitioner's] unclaimed funds." *Id.* at 20a. It concluded that the United States had not "committed an unconstitutional taking by failing to pay interest on unclaimed funds it was obligated by statute to hold for [petitioner] due to his own negligence." *Id.* at 20a-21a.

3. The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-14a. The court acknowledged the general rule that "the interest on funds 'follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.'" *Id.* at 9a (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162 (1980)). The court found, however, that the "interest follows the principal" rule was inapposite here. The court explained that because "interest was never earned on the funds" in the Treasury that represented petitioner's distributive share of the bankruptcy estate, "there was no interest to follow principal." *Ibid.* The court further observed that petitioner had failed to identify "any authority supporting the proposition that interest that was never earned [may] establish a property right for purposes of the Fifth Amendment that is separate and apart from the right to the underlying principal." *Id.* at 11a.

The court of appeals also rejected petitioner's contention that the government had breached a fiduciary duty by depositing the relevant funds in a non-interest-bearing account. Pet. App. 12a-14a. The court explained that neither the plain language of 28 U.S.C. 2041, nor any case construing that provision, obligated the government to invest petitioner's distributive share of the bankruptcy estate in such a manner as to ensure the generation of interest. Pet. App. 12a-13a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As the court of appeals correctly found (see Pet. App. 8a-12a), petitioner's Fifth Amendment claim fails because the "property" that he asserts was "taken" never existed. At least under some circumstances, retention by the government of interest earned on private funds temporarily held in a government account may effect a taking of property. See *Webb's Fabulous Pharmacies*, 449 U.S. at 160-165. In the present case, however, petitioner does not dispute the court of appeals' determination that the funds representing his distributive share of the bankruptcy estate did not in fact earn interest during the period they were held in the Treasury. See Pet. App. 9a. "[B]ecause there existed no interest, there was nothing that could be taken." *Id.* at 10a.[2] Nor does petitioner contend that the government breached any statutory requirement that the funds be deposited in an interest-bearing account. And whether or not petitioner was "negligent" in failing to apprise the bankruptcy court of his new address (see Pet. 5-6 n.4, 7 n.5; Pet. App. 20a-21a), it is clear that the government took no action to *prevent* petitioner from obtaining his distributive share of the

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[2] For essentially the same reason, the petition in this case need not be held pending this Court's decision in *Brown* v. *Legal Foundation*, No. 01-1325 (argued Dec. 9, 2002). Like *Webb's Fabulous Pharmacies*, that case involves a takings challenge to state rules governing the disposition of interest *actually earned* on client deposits. See *Washington Legal Found.* v. *Legal Found.*, 271 F.3d 835, 844-846, 860-861 (9th Cir. 2001).

bankruptcy estate as soon as the bankruptcy proceedings terminated.

2. Petitioner contends (Pet. 7-10) that a circuit conflict exists on the question whether the government's failure to deposit funds in an interest-bearing account can give rise to a valid takings claim brought by the person who is ultimately entitled to those funds. Petitioner relies (Pet. 8) on the rulings of the Sixth and Ninth Circuits in *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998), and *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995). Petitioner's reliance on those decisions is misplaced.

The cases cited by petitioner held that "constructive" interest—*i.e.*, interest that could have been earned if private funds had been held in an interest-bearing account—could appropriately be awarded when the government retained possession of seized funds pending resolution of a forfeiture action and thereafter failed to establish the forfeitability of the money. See *$515,060.42 in U.S. Currency*, 152 F.3d at 504-506; *$277,000 U.S. Currency*, 69 F.3d at 1497. Four other courts of appeals, by contrast, held that sovereign immunity barred recovery of interest in that setting absent express statutory authorization. See *Larson* v. *United States*, 274 F.3d 643, 647 (1st Cir. 2001); *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610, 614-615 (10th Cir. 2000), cert. denied, 534 U.S. 856 (2001); *United States* v. *$7,990.00 in U.S. Currency*, 170 F.3d 843, 845-846 (8th Cir.), cert. dismissed, 528 U.S. 1041 (1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 238-239 (2d Cir. 1998). In 2000, Congress effectively resolved that circuit conflict by providing that in forfeiture proceedings in which the claimant substantially prevails, owners of cash and negotiable instruments are

entitled to interest for the period during which the assets were held by the government. See 28 U.S.C. 2465(b)(1)(C).[3]

Although the Sixth and Ninth Circuits found "constructive" interest to be a permissible element of relief at the conclusion of an unsuccessful government forfeiture action, neither court suggested that payment of such interest was mandated by the Fifth Amendment. In addition, the basic policy justification for requiring that interest be paid in that setting—*i.e.*, the fact that the government's acquisition of the property is

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[3] 28 U.S.C. 2465(b)(1) provides in relevant part:

> Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for —
>
> * * * * *
>
> (C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale–
>
> (i) interest actually paid to the United States from the date of the seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and
>
> (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 4(a), 114 Stat. 211.

premised on forfeiture allegations that are ultimately found to lack merit, see *$277,000 U.S. Currency*, 69 F.3d at 1493 (duty to pay interest prevents the government from "profit[ing] from wrongly seized property without recourse by the owner")—is inapplicable here. Petitioner disavows any contention that the deposit of the relevant funds into the Treasury constituted a Fifth Amendment taking (Pet. 5-6 n.4), and he does not contend that the government's acquisition of the money was otherwise unlawful.

Unlike the forfeiture cases cited above, moreover, the instant case does not involve a situation in which the government retained funds for an extended period over the objection of the putative owner. To the contrary, petitioner's distributive share of the bankruptcy estate was disbursed to him upon the entry of the bankruptcy court's final decree. See Pet. App. 3a. After petitioner failed to cash that check within a 90-day period, the relevant funds were transferred to the Treasury only until such time as petitioner filed a claim with the bankruptcy court seeking his share of the estate. See *id.* at 3a-4a. Where (as here) the government neither earned interest on the relevant funds nor prevented petitioner from doing so, nothing in the decisions on which petitioner relies suggests that the Fifth Amendment required the payment of interest for the period during which petitioner allowed the funds to remain in the Treasury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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